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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 425

PANAMA MAIL STEAMSHIP COMPANY
(a corporation),
Petitioner,

vs.

ERNESTINA ISABELLE VARGAS,
Respondent.

BRIEF FOR RESPONDENT.

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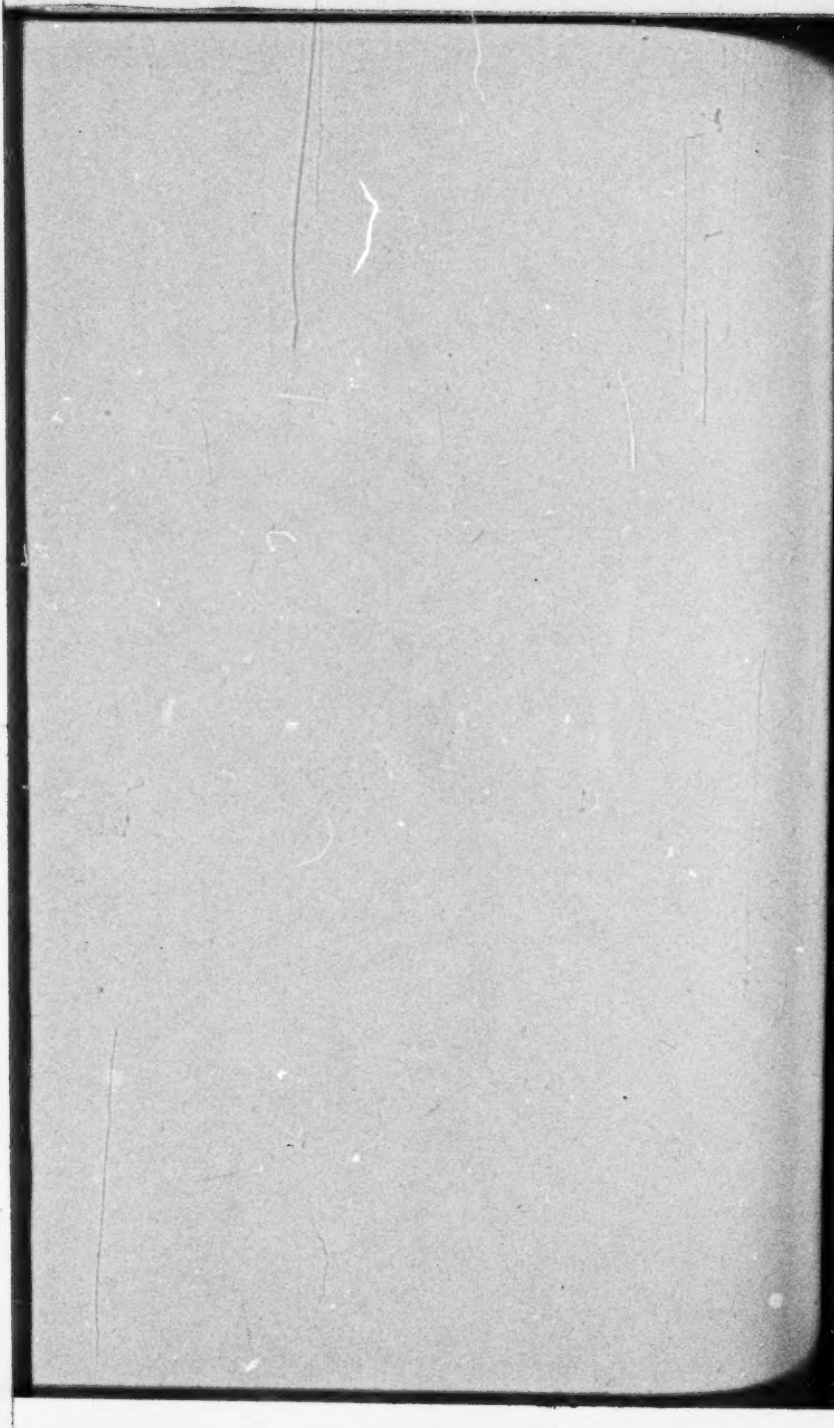
Attorney for Respondent.



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vs.

ERNESTINA ISABELLE VARGAS,
Respondent.

BRIEF FOR RESPONDENT.

RESPONDENT ALSO RESPECTFULLY REQUESTS CONSIDERATION OF HER BRIEF FILED IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

The many inaccuracies, omissions and misstatements in petitioner's statement of the case contained in its brief, including that part of it printed on page 1, headed, "Introduction," compel respondent to make a complete statement, which we offer with an apology for its length, which is found to be unavoidable.

Briefly, however, the facts are that respondent, a previously chaste girl of the age of 24 years, well brought up and educated, went on board petitioner's vessel, "Ecuador," on October 10, 1927, at La Libertad, Salvador, for passage to San Francisco. She was a human being and petitioner took her safety in charge and under its care when she went on the vessel. She took seasick immediately upon arriving on the vessel and so continued to San Francisco. About 38 hours after her arrival on board, while she was in her room alone, nauseated by seasickness and weak from the lack of food, one Jose Blanco, or Jose Blanco Reyes, petitioner's second steward, a petty officer, entered the stateroom occupied by her in an isolated part of the vessel and criminally assaulted her against her utmost resistance—the assault being as atrocious an assault as ever was committed on a human being—by reason of which she became pregnant with child, born to her according to the average law of human gestations, 280 days thereafter, and the child resembles Blanco. (R. 45, 149.) ***Respondent did not assume the risk of that assault.***

All the expenses of the maintenance of the child, amounting to $31.00 per month, not including clothes, having to be borne by respondent, she working as a seamstress. (R. 44, 47, 49.)

There has never been any denial that he is the father of the child and we find nothing in the record that explains its conception excepting the testimony of respondent and admissions made by Blanco himself and just what petitioner depends upon we do not

know, other than it has picked out a sentence here and there in the testimony with the possible hope that it might be believed, without a word of evidence to base it on. That a weak, seasick, previously chaste girl, well brought up, voluntarily solicited sexual intercourse with a total stranger and had only spoken to, to the extent of saying in substance, "I thank you," 38 hours before the outrage was committed. (R. 60-61.)

Testimony has to be taken as a whole. We now ask the court's attention to that part of petitioner's brief marked "Introduction," as follows:

The libel was filed March 22, 1928. (R. 8.) The trial commenced September 12, 1928, and lasted three days. (R. 21, 22, 23.)

In the five months and 21 days petitioner took the depositions of the master, the steward, and the second steward of the "Ecuador," the latter being the person who committed the outrage on respondent. It had in court the purser as a witness, also a passenger, and there is not the slightest intimation in the record that it wished other witnesses or wanted any. The child was born to respondent in a hospital in San Francisco, on July 19, 1928. It was accessible to petitioner at the trial if it wanted to compare its features with Blanco's. It never asked for time to get further testimony, if it had or wanted any. So the following statement on page 2 of petitioner's brief is without any foundation,

> "and was therefore barred from obtaining evidence invaluable in such cases."

Respondent testified through an interpreter. The cross-examination was both by counsel for petitioner and by the court. She was on the witness stand a day and a half, *and the court believed her.* No one who saw her on the stand and heard her testify could do otherwise. Blanco, the Filipino steward, never at any time tried to protect himself from the charges made against him. On the contrary, as will hereafter appear, he admitted the outrage over and over again in the office of petitioner, Panama Mail Steamship Company and elsewhere and never denied it until his deposition was taken in counsel for petitioner's office, May 31, 1928.

We also respectfully state, that there is nothing in the record upon which can be based the claim that the trial court was influenced by natural indignation or anything else but the law and the facts of the case. It was submitted on briefs of both sides, held under consideration more than four months, and the only foundation for counsel's strictures upon that court must be his belief that the trial court should have decided an overwhelmingly established case of rape, rightfully or wrongfully in favor of his client.

And we respectfully submit that the reflections on the learned Circuit Court of Appeals, found on pages 5, 37, 38 and 39 of petitioner's petition herein, and the following on page 3 of its brief,

> "On appeal the Circuit Court of Appeals in a two page opinion, practically washed its hands of the case by declaring it was a decision of facts in which the upper court would not interfere,"

are uncalled for.

Judge Rudkin wrote the opinion for that court. His record as a state and federal judge on the Pacific Coast is long and honorable, and he needs no champion on that coast. He has a reputation for reading all the testimony and the whole of the contents of all the briefs in any case. The opinion he wrote herein has the merit of brevity. On its face it shows conclusively that he read the whole record, and the conclusions of the court as shown by the opinion he wrote and the judgments herein are in conformity with the decisions of this court and also the general law.

As to the facts of the case:

In the trial court herein 13 witnesses testified, 7 for respondent and 6 for petitioner, and two depositions were introduced by respondent, and one that of the second steward by petitioner.

The evidence (R. 21-24) shows that Miss Vargas was a woman 24 years old at the time of the occurrence she complains of; that she is refined in her conduct and manner; well educated, both religiously and scholastically, the language of her testimony shows the latter, and not one word against her character can be found in the evidence.

The evidence further shows (R. 24-25) that Miss Vargas was born in San Miguel, Republic of Salvador, and lived there all her life, she attended a nonboarding school from the time she was seven to twelve years old, and after that became an interne student at the college of Santa Techla about one hour's ride from the capital of Salvador until she

was nineteen, when she went home and lived with her parents for about five years, making a little trip with her mother to the port of La Union, in 1912, about 15 years before she went on the "Ecuador." Her father is a jeweler in San Miguel, and in October, 1927, it was decided that she should come to San Francisco, for the purpose of learning the English language, taking advantage of the fact that she had a brother here. (R. 25.) Her father purchased a ticket, gave her some money, which she deposited with the purser when she went on board the "Ecuador" and nothing else, having it returned when she left the boat in San Francisco (R. 37), and she went to the Port of La Libertad where the "Ecuador" was to arrive (R. 26-29), a brother in San Salvador, her cousin and her cousin's husband being there also. Her brother and cousin's husband went with her to the "Ecuador" in a gasoline launch. Upon getting on board the brother went to the first person they met, Jose Blanco, who she later found to be the second purser or steward. She had been assigned to stateroom 31, which was one room from the end of a corridor about 80 or 90 feet long. (R. 278.) Her brother appears to have gone down to the stateroom with her, and they then went on deck to get her a deck chair, which her brother purchased for her, Blanco telling him where to get it. Her brother spoke to Blanco, who told him that he spoke Spanish, and that he would explain things in the dining-room to her. Her brother stayed about fifteen minutes on the vessel, and left for the shore. Blanco himself, by deposition,

testifying (R. 219), speaking of her brother when on the vessel:

"Q. And he asked you to take good care of her?

A. He was recommending me to take good care of her because I was second steward.

Q. He asked you to take good care of her, didn't he?

A. Yes.

Q. And you said you would?

A. Yes, sir."

The only participation respondent had in that matter or conversation with Blanco prior to the assault is found in the record at pages 60 and 61, as follows: That when she went up the gang-plank Blanco asked if there was anything he could do for her, and said that he would be glad to serve her in any way, and the following occurred:

"Q. What did you say?

A. I thanked him.

Q. And that was the only other conversation you had up to that time with that fellow?

A. Yes."

Miss Vargas became badly seasick the moment she got on board (R. 29), and so remained up to the time the vessel arrived in San Francisco, all the witnesses agree on that. (R. 172, 272.) She went on the vessel October 10th, about 4 p. m. and the vessel left La Libertad at 9:45 p. m. October 10th (R. 252), the steamer having at 8 p. m., October 11th left San Jose her last port of call and started for San Pedro, California. (R. 253.) Miss Vargas left the deck at about 9 p. m. and went to her room; she was alone

in the room, was seasick all night, getting up twice to vomit in the wash basin (R. 31), but was unable to vomit anything but bile (R. 94), as she had eaten scarcely anything since she went on the vessel, thirty-seven hours before, and she woke about, as she thinks, 5 a. m.; having no watch she was not sure about the time, about from 6 to 6:30, she unlocked the door for coffee. She also testified that she had a great deal of nausea. She testified (R. 31):

> "A. I left my bed for the purpose of opening up the door, as I could not go upstairs to get coffee, I thought it was better to have it brought there." (R. 32.)
>
> "Q. Did you try to dress at that time?
> A. Yes, but I could not, because I could not sustain myself, and I returned to bed."

Blanco entered her room at about 6:30 to 7 a. m. (R. 32, 59), and first asked her how she felt from the seasickness; she replied quite sick; he then pushed the door shut, and took hold of one of her hands, which she withdrew, and then commenced to use love phrases to her telling her that he had sympathized with her very much from the moment she came aboard the ship and had commenced to like her quite a bit. She asked him to do her the favor to keep still, and he then got close to her and took her two hands; she struggled to loosen herself, and he then raised her two hands above the level of her shoulders and put them against the pillows. (R. 32, 33.) "He had both of my hands and was lying on top of me and I was helpless." (R. 70.) She kept struggling, telling him that if he did anything to her he would greatly repent

it (R. 88), he kept kissing her and finally held one of her hands with one hand and with that arm held the other arm down, and with the other hand evidently unbuttoned his pants and in spite of all she could do had sexual intercourse with her, by that time her struggles had got her over to the side of the bed, with her legs from about six inches above her knees over the side of the bed, he forced her legs apart by inserting one of his legs between hers and got in the center (R. 91) and completed his purpose.

There is not a shred of evidence that anyone was near that room at the time other than Miss Vargas and Blanco; it does appear that the twenty or more bell-boys, bath-boys and waiters of whom Blanco was in charge go on duty at 6 in the morning and the first thing they do is to scrub the floors of the dining-room, wash the paint work down, wipe the dust down and polish brass. (R. 270.) Room 31 was immediately below the dining-room. (R. 278.) After all the scrubbing and cleaning is done, which with 20 men doing it must make considerable noise, the waiters get ready for breakfast, which is at 8 o'clock, after that they clean up the rooms. (R. 277.)

There were but few passengers on the vessel. The vessel had only about half of her complement of passengers. (R. 279.) Respondent's Exhibit 2 (R. 48) shows 55, and her complement was 109. (R. 276.) And the only passengers in the corridor that the state-room Miss Vargas occupied that appear in the record, was a Chinaman and his family that joined the vessel

at Gautemala, but changed on account of the heat. (R. 94, 95.)

She was interrogated at length as to why she did not cry out, and testified (R. 34):

"A. Because at that particular moment I did not have courage to cry out, and not knowing who would come to my aid, and my voice might not have been heard, on account of the noise that there is in the morning aboard ship, I did not think it possible to be heard."

(R. 87):

"A. Because it didn't occur to me, I did not know that that man entered with bad intentions. What I did was to withdraw my hand forcibly.

A. Because at that moment it did not occur to me to cry out; the only thing that occurred to me was to defend myself.

Well, I moved my body and did everything that was possible to loosen my hand."

(R. 33):

"A. In the first place I did not holler out, because it did not occur to me, because I was afflicted with what was happening."

(R. 34):

"A. Besides I was telling him to leave me alone, to loosen his grip.

A. I don't know. All I do know is that there was an opening that led to the barber-shop, which was some distance away from there, but at that time in the morning I didn't know whether it was open."

(R. 87):

"Because I did not think he came in with bad intentions because at the moment of entering, he asked me, 'Miss, how do you feel, how are you.'"

(R. 88):

"Q. Did you strike him in the face, or scratch him?

A. I did not have the chance, because my hands were held."

As to the unlocking of the door, she testified (R. 79):

"Q. If it was for coffee, why didn't you accept the coffee that Blanco, when he first came into the room, offered to give you?

A. Because he offered to give me coffee, and I knew that a messboy would bring it, and I did not want to accept any favors from him.

Q. Why didn't you want to accept any favors from him, if he was the second steward, and you never had a word with him, except going up the gang plank?

A. Up to that time I did not know he was second steward."

After Blanco had accomplished his purpose, she got up and cried.

(R. 71):

"A. I didn't say anything; I was so completely exhausted."

(R. 35):

"After the act, he saw me cry, and he told me not to worry, that he would marry me.

A. That if I wanted to, we would get married in San Pedro.

A. He says for me to say nothing to anyone; that he would be of service to me, that I would not get any advantage through *it, because they would not pay any attention to me.*

I said nothing; I only cried."

The vessel arrived in San Francisco October 21st, and her sister-in-law met her on the steamer and took

her to her home. (R. 142.) Her brother missed her as he was attending to some trunks or papers or something for her. He went out home when Miss Vargas handed him a letter from their father that she had brought up, in which he stated that he was sending a ring to him by his sister; the brother asked for the ring and Miss Vargas told him a man on the ship had taken it away from her (R. 108, 109); the brother, his wife and Miss Vargas then went down to the ship to get the ring. (R. 110, 143.) There is nothing in the record showing they had any other purpose in going. The ring was on her finger at the time of the assault, but being loose fell off to the floor in the struggle, and Blanco picked it up, "gathered it," as she testified (R. 37), and carried it away with him. Upon their arrival at the vessel Blanco took the ring off his finger and handed it to the brother. Blanco was not produced at the trial, his deposition was taken, when he testified (R. 224, 225) that he never had a ring, never saw a ring, and did not hand a ring over on the above occasion, although three witnesses produced in court testified that he did.

The brother, Ralph Vargas, testified (R. 111):

> "A. Yes, he served liquor there and I said, 'I thank you, I want you to come out for dinner to my house,' because I didn't like to get anything without paying for it."

The brother, and his wife were in complete ignorance of the assault for some time after that, Miss Vargas testifying she did not have the valor to tell him as she was afraid it would shock him too much. (R. 39.) He testified that they had always been very

strict in his family and she was afraid he would throw her out. (R. 116.) She further testified (R. 74) that she did not know she was in that condition until they took her to a doctor (R. 38):

> "A. No, I did not want to tell them, because I did not want to cause a terrible impression, because I had come especially recommended to them in San Francisco."

There were some exchanges of courtesies between the brother and his wife and Blanco, but all the testimony shows Miss Vargas had nothing to do with them. The brother testified (R. 106) about going out to a cafe:

> "A. We took my sister along because we could not leave her in the house by herself."

The testimony shows that she never spoke to Blanco at any of those times, and the visits between Blanco and the Vargas family seem to have been confined to two. (R. 73.)

In March, Miss Vargas had to tell someone of her condition, and being afraid and ashamed to tell her brother, she went to a friend of the family (R. 39):

> "I told Amaral I didn't know what to do, that I am in such a condition, that I would like to leave this place and go somewhere else, because I am afraid to shock my brother too much."

Shortly before that Miss Vargas complained about not feeling well to her sister-in-law who took her to a doctor. (R. 144.) When Miss Vargas came out of the doctor's room crying (R. 144), that was the first time her sister-in-law knew anything about the matter; her husband did not know then. (R. 146.)

Mrs. Vargas was afraid her husband would find out about it, so she went to see Blanco and told him her sister-in-law had told her what had happened to her, and she wanted to know what he was going to do about it because she was afraid her husband would find out about it. He suggested getting a doctor for a criminal operation, saying that he supposed it would need money for that, that he had not any right then but would be able to find some. She suggested marrying respondent, as she was afraid her husband might find out and do something rash. He then told her he was married and had children. (R. 145, 146, 147.)

Amaral, however, went and told her brother (R. 130, 132, 133, 134) and asked him not to put her out of his house. (R. 132.) And the brother told him to take her to the United States authorities and make a complaint, which was done, and Blanco was arrested.

The hearing was had before Commissioner Krull, and it seems they had a great deal of trouble about getting an interpreter, they had three, none appears to have been able to interpret Spanish correctly. (R. 54, 92.) Commissioner Krull (R. 205):

> "A. She could not speak English, and we had quite a little time getting someone to interpret and we finally called upon Mr. Grant, a bailiff of the court, who talked Spanish, and he came in and did the interpreting."

(R. 92):

> "A. That it took considerable effort to make myself understood literally with them when they spoke to me.
> Q. Could they talk good Spanish?
> A. No."

It appears that she learned Blanco was a married man for the first time at the hearing before Commissioner Krull. (R. 73.) Respondent testified as follows before Commissioner Krull (R. 69):

"Q. Did you kiss him?
A. I resisted.
Q. How did you resist?
A. By trying to throw him off.
Q. Did you hit him?
A. I could not, he held both my hands."

* * * * * * *

(R. 70):

"Q. And what did you do when he did that?
A. I was helpless; I couldn't do anything.

* * * * * * *

Q. As a matter of fact, isn't it the truth that you didn't fight with all the strength you had?
A. No, I resisted with all the strength I had.

* * * * * * *

Q. Did you scratch him at all or hit him?
A. No, I couldn't do anything. He had both of my hands and was lying on top of me, and I was helpless."

(R. 71):

"Q. And what did you say?
A. I didn't say anything; I was so completely exhausted."

That is the only description of the attack there was before Commissioner Krull, and seduction cannot be made out of that. Blanco should have been held for the Grand Jury, as that evidence shows nothing but rape.

Defendant was represented there, Commissioner Krull believed her story but thought the case was seduction. Blanco was there and made no denial, the

charge of rape was dismissed and a conversation held in which it was agreed that Miss Vargas should go down to the petitioner's office next day and some financial arrangement should be made on account of her condition and that she should pursue her remedy in the state court. (R. 202, 203, 204, 196, 197-201.) Mr. Grant, then the bailiff of Judge Kerrigan's, now of Judge St. Sure's court, testified in full on that and that someone there gave him Mr. Shenick's (appellant's port steward) card to give to Miss Vargas, so that she would know where to go. (Libelant's Exhibit 1.)

Miss Vargas, accompanied by her brother and Mr. Amaral, went down to both of appellant's offices the next day. Reaching the port steward's office, Blanco was called in; he there said he was sorry for what he had done to Miss Vargas, was willing to pay the expenses of her sickness and take care of the child, and Mr. Shenick gave Mr. Amaral another of his, Mr. Shenick's cards, looked at the calendar and told him to ring up on May 18th, the vessel would be back on that day, for Amaral to call him over the 'phone and bring those people down, and I will see that Joe gives some money to her, and from then on would take care of Miss Vargas and later on would take care of the child. Blanco also said that "the child that was coming was his, that he was sorry for what had happened and would take care of her." To have proceeded any farther would have been compounding a felony.

The vessel went away; this case was commenced about a week after the foregoing. The vessel returned and a day or so afterwards Blanco called up Mrs.

Julian, the mother of Mrs. Vargas, on the phone, went out to her house and talked to her quite a while about the whole matter, told her that he was very sorry, that he wanted to arrange everything amicably with her because there was no need for any lawyers nor any litigation; that he could pay the hospital expenses; that if the child was a girl to give it the mother's name, if a boy his name; that he was sorry for what had occurred, because he was a married man, but if Miss Vargas would wait he would get a divorce and get married to her, but that he did not have any case or reason to get the divorce, etc. (R. 156, et seq.)

Blanco was cross-examined twice and a foundation was laid for impeachment on all of the matters that evidence was introduced on, and he denied everything, contradicted the statement of Commissioner Krull, Mr. Grant, and everyone else that testified for the libelant, seven in all.

All we find to controvert the above mass of testimony is (R. 211):

> "A. I never talked to Ernestina at all; just pass there in saloon and salute me; just say 'Good morning.'
>
> Q. At any time during the month of October, 1927, did you go into the room—stateroom 31—while Ernestina was there?
>
> A. No. I never seen her in the room.
>
> Q. Did you at any time have any relations of any kind with Ernestina?
>
> A. No, sir."

He was cross-examined twice and a foundation was laid for impeachment on all of the matters that evi-

dence was introduced on, and he denied everything, contradicted the statement of Commissioner Krull, Mr. Grant, and everyone else that testified for the libelant, seven in all.

Mr. Shenick went on the stand and contradicted Commissioner Krull, Mr. Krull's records, Mr. Grant, Mr. Amaral and Mr. Ralph Vargas.

A male child was born to Miss Vargas on the 19th day of July, 1928, her labor pains commencing on the 18th; we assume that the labor pains are a part of the birth of the child, and the 18th day of July, 1928, was exactly 280 days after the 12th day of October, 1927, the average period of human gestation. It is in evidence that the features of the child resemble Blanco. (R. 45, 149.) Miss Vargas owes the doctor's bills, works as a seamstress and pays $25.00 per month for the care of the child, and $6.00 for milk. (R. 47.)

When the fact that she was with child became noticeable, her brother and sister-in-law were forced to send her to the country. (R. 42.)

> "A. I left here because even though no one knows me, the friends of my brother who would come there would make me feel ashamed that I was in that condition."

Miss Vargas is of frail stature, Blanco is short and very stout (R. 46) and weighs about 160 pounds. (R. 218.)

Blanco was before Commissioner Krull March 16, 1923, and made no denial. (R. 204.)

> "Q. He never made any denial of this girl's charges?
> A. There was no denial.

Q. Blanco or Blanco Reyes was there?
A. He was present at the hearing.
Q. He never made any denial of this girl's charges?
A. There was no denial."

The next day, March 16, 1928, the following occurred in one of petitioner's offices (R. 117):

"Mr. HUTTON. Q. What did Shenick tell you?
A. Shenick said that Blanco was—Blanco said before that he was awfully sorry for what he did to my sister, that he was able to help my sister, that he was able to help my sister in anything that it comes to, and he gave us a card, the steward, that fellow gave us a card and told us to come there, or call him up, and 'Will you come over to me and we will make some arrangements.'

* * * * * * *

A. Blanco said he was awful sorry for what he did." (See R. 127, 128, 136, 137.)

The complete ignorance of the brother and sister-in-law of the assault is shown by the fact that as soon as he learned of the assault he told Mr. Amaral to take her to the United States authorities. (R. 132.)

"A. Yes, the brother told me to take her to the United States authorities, that she wanted to make a complaint."

Upon going to counsel for petitioner's office to have his deposition taken Blanco's front completely changed, and both lower courts herein, the trial court in effect and the Appellate Court directly (R. 298) find he was guilty of false swearing, and on page 35 of petitioner's brief, we find the following admissions:

"We do not deny that this steward is guilty of false swearing."

* * * * * * *

"He is a Filipino and from the testimony in this case we think he lied to us."

Of course, that is an admission that he told the truth when he spoke to Mrs. Vargas, Mrs. Julian, and to Mr. Vargas and Mr. Amaral down in petitioner's office, at Pier 46 in San Francisco.

On the day of the assault, Miss Vargas spoke to the steward and asked him to put someone in the room with her, testifying that she did not want it to happen again, that she was very much afraid. (R. 36.) The steward testified (R. 269) that he knew enough Spanish to talk to people on the ship and find out their wants, respondent thought he did not understand her, but he must have done, as that night Miss Villavicencio went into the room about 9 or 9:30 p. m. (R. 172.) Miss Villavicencio was not in room 31 at the time of the assault, her own testimony shows that the vessel left La Libertad October 10th (R. 252), Miss Villavicencio joined the vessel in Corrinto (R. 172), where the vessel left October 9th (R. 194), and testified she slept in the second cabin for two nights, so according to her story she could not have gone into room 31 prior to October 11th, but she says she went there at La Libertad, the vessel had left La Libertad and was at San Jose de Guatemala on October 11th, having called at Acajutla on the same day (R. 252); she also testified (R. 270) that it took two and one half days to go from Corrinto to La Libertad, when in fact the steaming time was 13

hours (R. 194); she also testified (R. 168) that she went into room 31 between 5 and 6 in the afternoon and on (R. 172) that she went in at 9 or 9:30, when she went to bed.

She testified (R. 167, 172) that the vessel arrived in San Francisco in November when the fact is she arrived there on October 21st. (R. 252.)

The young lady's testimony is such a mass of contradictions and so contradictory to the facts, that none of it is worth considering. But, she could have been assigned to room 31, and been absent on deck or elsewhere about the vessel and this assault could have happened.

The steward of the vessel as to when Miss Villacicencio was put in room 31 (R. 271):

> "A. It was either the night we left La Libertad, or the next morning I would say; I am not sure as to that."

The best that can be said for that is, that the steward made a guess at the date, and was not sure as to his guess.

All that Mr. Lorenzen knew about Miss Villavicencio is based upon the following (R. 178):

> "A. I believe, after I talked the matter over, that she was a passenger from Corrinto, Nicaragua, to San Francisco, a steerage passenger."

That showed he had no independent knowledge on the matter at all, and makes his whole testimony worthless, and as to Mr. Mallory, he was in San Francisco, and his records would not have been admissible in

evidence if they had been produced; but they were not even produced.

Blanco could not have entered the stateroom for an hour after the door was unlocked.

As to not ringing the bell when he came in, she testified she did not think he came in with any bad intention (R. 80), he almost immediately afterwards took hold of her two hands and threw them up over her shoulders and held them on the pillow, she could not ring the bell then. (R. 33, 87, 88.)

She had nothing but a nightgown on. (R. 33.)

"As I was only in my nightgown, he finally overcome me."

As to her going to breakfast after the attack, the following is what occurred:

(R. 76):

"A. Yes, I left at that hour to go to breakfast, but I did not go to the dining-room, I remained on deck because I could not stand up."

(R. 93):

"A. All that I did was to walk from the door that led to the deck, to the chair that was near by—the deck chair was near by.

A. I remained seated in the deck chair during the day and likewise the remainder of the days."

The testimony on the wearing of the ring is as follows (R. 84):

"Q. Where did the ring fall?
A. To the floor.
Q. He stole this ring?
A. He gathered it up.

Q. And you saw him with the stolen ring for all the rest of the voyage, wearing it?

A. I saw him wearing a ring on the hand, but I didn't know if that was the one.

Q. Didn't you testify before the United States Commissioner that that was the ring he was wearing?

A. No, I said that I did see him wearing a ring, but I didn't know whether that was the ring; but that when I went with my brother to get the ring that that was the ring that he had on."

Of course, it is obvious that if she had given the ring to Blanco to keep for her, she would have asked him for it before she left the ship to go to her brother's house, and would not have gone there without it. She got her money from the purser before she left the vessel. (R. 37.) The various presents mentioned on page 7 of petitioner's brief, are as follows (R. 112, 113):

Ralph Vargas noticed a pair of shoes on Blanco's feet; the latter told him he got them in New York, and Blanco asked his size and brought him a pair, and he gave Blanco a cushion in return. Mrs. Vargas asked him to bring her a parrot, but Blanco sent her a canary bird instead that he wanted to give away to somebody. Then Blanco placed an order for two hats with Mr. Vargas to give to the firm the latter worked for, saying he wanted them for two lady friends of his; Mr. Vargas got the hats, took them down to the boat with a charge of $15.00; Blanco said he did not have the money then but would send it from Los Angeles, but didn't (R. 119, 120, 121); and when Amaral respondent and Ralph Vargas went

down to the petitioner's office pursuant to the arrangements made in Commissioner Krull's office, Amaral demanded payment for the hats, and Blanco paid the money after haggling about the price. (R. 128, 129.)

II.

RESPONDENT'S ASSIGNMENT OF ERRORS.

(R. 291.)

The said lower court erred in not awarding appellee a much larger sum than ten thousand ($10,000.00) dollars for the wrong she sustained, as that amount is not sufficient compensation for such wrong as shown by the evidence herein, and it would require a much larger sum than that to compensate her for such wrong, and the record herein also shows that the appellant condoned the action of its second steward of the vessel "Ecuador," who committed the said wrong upon appellee by treating the same lightly, not insisting upon his prosecution for the crime he had committed, endeavoring to arrange for a compromise of appellee's wrong, and generally affording him aid and comfort after he had violated the chastity of the appellee against her will, resistance and consent on board of appellant's vessel "Ecuador."

Wherefore appellee prays that the award of damages to her herein may be largely increased.

III.

PETITIONER IS RESPONSIBLE IN DAMAGES FOR THE ASSAULT.

Counsel for petitioner admitted that in both lower courts; we however cite the following authorities:

New York Central Rd. Co. v. Mohiny, 252 U. S. 150, 157-8.

"A carrier by rail is liable to a trespasser or to a mere licensee willfully or wantonly injured by its servants in charge of its train (Thompson's Commentaries on the Law of Negligence, 3307, 3308, and 3309, and the same sections in White's Supplement thereto) and a sound public policy forbids that a less onerous rule should be applied to a passenger injured when lawfully upon one of its trains, this much of protection was due plaintiff as a human being who intrusted his safety to defendants keeping. Southern Pacific Co. v. Schuyler, 227, U. S. 601-613. It arose from the fact that he was a human being of whose safety the plaintiff in error had undertaken the charge; with his consent he had placed his life in its keeping. Missouri, Kans. & Texas Ry. Co. v. Sealy, 248 U. S. 359-363.

His claim rests not upon contract of carriage, but upon the general right of a human being not to be injured by the negligence of another * * *."

Steamboat Co. v. Brockett, 121 U. S. 637, 645.

"a common carrier is bound as far as practicable to protect his passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract."

New York Central Ry. Co. v. Lockwood, 17 Wallace 357;

New Orleans & N. E. Railroad Co. v. Jopes, 142 U. S. 18, 20;

Kansas City, Southern Ry. Co. v. Willslie, 224 Fed. 908.

And the many cases cited therein.

We could cite many others.

IV.

ARGUMENT.

If this court will consider claimed errors in the admission of testimony herein:

The testimony on page 12 of petitioner's brief was admissible on two grounds; one was to impeach Blanco. He was cross-examined twice and a foundation laid. (R. 218, 246.)

Another ground, petitioner itself placed Commissioner Krull on the stand. (R. 201-206.) He testified about an arrangement made before him by which respondent was to go down to petitioner's office where some financial arrangment would be made. (R. 203.) Miss Vargas went to two offices, at one, the main office, with Mr. Amaral and her brother and were told that Mr. Schnick at pier 46 had charge of the case and directed them there. What occurred in that office was the consummation of an arrangement made in which respondent took part. Commissioner Krull (R. 203):

> "A. Blanco was there, and there was someone there that represented the steamship company."

What occurred at pier 46 was a part of a transaction that respondent was entitled to.

The evidence of Mrs. Julian, page 13 of brief, was admissible for the purposes of impeachment.

Miss Vargas had already testified that she had made no outcry, so it was entirely immaterial whether if she had made one it could have been heard. (Brief, 13, 14.)

Petitioner's argument about the rooms on the corridor on which stateroom 31 was situated is specious. All the evidence shows there was no one in the rooms. Blanco, as second steward, certainly knew that, hence saw that he would be unmolested in his attack.

Miss Vargas had a right to sit on deck, a great many seasick people prefer the deck where there is plenty of air to a stuffy stateroom.

About having absolute protection with the door locked, we all of us undoubtedly unlock some door or other every day of our lives. The lock was there to be unlocked and people usually use them by unlocking them.

In *People v. Lawler,* 79 Cal. App. 208, 209, a lock matter came up and it seems that counsel for defendant based some claim upon it. The court says:

> "Because at one time in her testimony the prosecutrix testified that she locked the door to her room before she went to bed, and, in another place in her testimony, she testified that about midnight the defendant entered her room, the appellant argues that her story is inherently improbable. *To state the argument is to answer it.* Perhaps the prosecutrix was mistaken when she testified that she locked the door, there are many other possible explanations that would square with her story."

Respondent did not unlock her door about breakfast time. Breakfast time on the vessel is 8 o'clock, testimony of Hr. Henry, the steward. (R. 270.)

The comparison of respondent's testimony on pages 20 and 21 of petitioner's brief, is a misstatement of the record.

It will be remembered that there was trouble about interpreters, and upon interrogation before the trial court (R. 61-67) she denied she had ever testified as the petitioner's brief states she did. Respondent stating (R. 54) speaking of the interpreter:

> "But he did not know how to interpret Spanish correctly?"

(R. 92):

> "A. That it took considerable effort to make myself understood literally with them when they spoke to me."

Counsel for respondent has never been satisfied with the transcript of purported testimony taken before Commissioner Krull. Miss Russell, who took it, testified (R. 51) that she had everything down that occurred before Commissioner Krull, and the testimony of Mr. Krull and Mr. Grant shows clearly she had not. (R. 96-206.)

The following in italics on pages 23 of petitioner's brief is absolutely incorrect.

> "A. Yes, I introduced him at that time, and said that he had taken care of the ring for me."

Miss Vargas (R. 72) testified squarely that she did not say that. As immediately below the foregoing,

upon being asked if she did not so testify before Commissioner Krull, she said:

"A. No. He presented himself to my brother and I told him he is the man who has the ring."

A further misstatement of the record is shown on page 26 of petitioner's brief, as follows:

"Q. And you gave the hats to Blanco?
A. Yes."

Ralph Vargas gave them to him in the sense that he handed them to him, as on pages (R. 119, 120, 121) he testified that when he gave them to Blanco the charge was $15.00 and Blanco said he hadn't the money then but would send it to him.

The card on page 34 of petitioner's brief is not in evidence. All respondent knew about it was it came to the house and she gave it to her brother. Her counsel sought to use it to impeach Blanco, but after visiting the Shipping Commissioner's office and comparing Blanco's signature on the shipping articles of the "Ecuador" he concluded the writing was not Blanco's, so dropped it; but even if Blanco sent it it would not bind respondent. It was simply marked for identification. (R. 49.)

The quotation from *Jensen v. Lawrence,* 94 Wash. 148, on page 51 of petitioner's brief, is only half of the instruction given; the defendant excepted to the instruction. The court held he was not harmed by it and decided as follows in that case.

Jensen v. Lawrence, 94 Wash. 148 (syllabus):

"The evidence in a civil action for an assault and rape is not insufficient to sustain a

verdict from the fact that plaintiff made no outcry, where she testified that she resisted and was overcome by force and that there was intercourse without her consent.

"Rape, Civil Liability, Evidence, Sufficiency. In a civil action for rape the failure of the plaintiff to make an outcry or complaint within a reasonable time, may be explained or excused and it is merely a circumstance which the jury may consider tending to impeach the plaintiff, and not a defense as a matter of law."

The record in this case shows that respondent did not have a thing to do with the intercourse between Blanco and her brother and sister-in-law, and that she never spoke to him, and the following statement on page 36 petitioner's brief, referring to Blanco:

"But the fact that a Filpino waiter from whom little can be expected in the way of integrity"
* * *

promotes the inquiry why did petitioner employ him and try to compromise the matter and keep him in its employment right along. His duties were (R. 256) Curt Zastrow, the master of the "Ecuador":

"Q. What are Blanco's duties?

A. Looking out for the comfort of the passengers and boss the boys; see that they keep their rooms and respective passengers' quarters clean." (R. 261.)

"He has got to look out for the comfort of the passengers. That means to say that he has got to see that everything in the staterooms is all right before the passenger goes in."

Henry, steward of the "Ecuador" (R. 209):

"A. He is to keep the boys working cleaning the rooms and runs the dining room; sees that the boys give the passengers the service."

Blanco was clearly in a position to attack a defenseless girl, as he knew all about the ship and had all the boys working overhead as they were in the habit of doing at that time of the morning. He knew the coast was clear.

A ship manned with unreliable people is unseaworthy and Blanco was the company as far as the passengers were concerned.

He is a married man with four children, and respectable women unquestionably travel on petitioner's vessel "Ecuador"; just how petitioner could continue to bring them in contact with him after the knowledge they obtained on March 16, 1928, has not been explained.

The port steward told Amaral (R. 128):

> "You know, Mr. Amaral, these things are known to me. This is not the first time that things of this kind happen, and a man gets stuck on a girl. I am very sorry."

And he told Blanco in effect that if he furnished money out of his wages, he could continue to work for the company.

If petitioner employs the class of people mentioned on pages 35, 36 of its brief, what can it expect?

V.

IF THE OUTRAGE IN THIS CASE WAS NOT RAPE, WHAT COULD IT HAVE BEEN?

Respondent, a girl of good family, well brought up, well educated, leaves her home and goes on board of

a vessel among total strangers. She does not speak the language of the vessel. Says "I thank you" to a man at the gangway, takes seasick as soon as she gets on board; does not see that man again for about 38 hours. At 9 p. m. of the next day she goes down to her room, is seasick all night, had eaten scarcely anything from the time she came on board and must have been weak and sick. She is assaulted and made pregnant with child. Of course there had to be sexual intercourse. She testified as to how it happened. There is no other explanation of it. Can it even be suspected that she sought that sexual intercourse? The physical facts of the child's birth are present, corroborating her. The admissions of the second steward and the actions of the company corroborate her. There is nothing in the record against her character; the unimpeached record shows that that is the only act of sexual intercourse that ever took place with her. Two courts have passed upon the law and the facts, and the following corroboration appears in the law of nature. It is uncontradicted that the child was conceived October 12, 1927.

> *Estate of McNamara,* 181 Cal. 82, 89-90.
>
> "While the average period of gestation is generally taken as 280 days."

> *Collier's New Encyclopaedia,* Edition of 1928, Vol. 4, page 305:
>
> "GESTATION. In physiology, the act of carrying young in the uteras from the time of conception to that of parturition, the average time of a woman's pregnancy is 9 solar months, or about 280 days, though it may be as few as 7 or as many as 10. * * *"

She commenced to have labor pains, which undoubtedly are a part of the birth of a child on July 18th, 280 days after October 12, 1927, and the only explanation of the conception is that given by her and the admissions of Blanco himself which he subsequently denied making.

In

Wharton & Stille's Medical Jurisprudence, Vol. III, page 27,

we find

> "If her intercourse has been confined to one individual, there is no difficulty in drawing a correct conclusion from the premises. * * *
>
> As a basis for that rule the period of gestation is taken at 280 days."

On page 29 there is a computation of several hundred cases from different doctors, that give an average of 269.7 days. Then a minimum duration given by Auvard of 242 days, and a maximum given by Rossie of 317 days, as follows:

Auvard, minimum	242 days
Rossie, maximum	317 days
Total	559 days
Mean	279.5 days

The child was conceived, and born, its conception was according to the average, and there is nothing in the record anywhere that points to anyone as being its father but Blanco, and his paternity of the child has never been disputed.

The trial court saw her physique, the frailty of her person and concluded from her manner of testifying

that a man short and stout, weighing 160 pounds committed the offense of rape, the learned Circuit Court of Appeals sustained the decree, so the facts are established, and this court has held as follows:

Norton v. Larney, 266 U. S. 511, 518.

"* * * The well-settled rule of this court is that where two courts have reached the same conclusion upon a question of fact it will be accepted here unless clearly erroneous. * * *"

Mills v. U. S., 164 U. S. 644.

"* * * Whether such threats were made or whether in their absence she resisted to the extent of her ability at the time and under the circumstances was a question for the jury. * * *"

If the case is tried before the court, the question is one for the trial court.

The following testimony of the prosecution is uncontradicted. What more could she have done?

(R. 34):

"* * * because every time he would get up close to me in the struggle he would kiss me."

(R. 69):

"Q. How did you resist?
A. By trying to throw him off.
Q. Did you hit him?
A. I could not; he held both my hands."

(R. 70):

"A. I resisted with all the strengtn I had.
Q. Did you scratch him at all or hit him?
A. No, I couldn't do anything; he had both of my hands and was lying on top of me and I was helpless."

(R. 87):

"A. Well I moved my body and did everything that was possible to loosen my hands.

Q. He had one of your hands in each of his hands?
A. Yes."

(R. 88):

"A. He grabbed my hand, and when I was finally able to withdraw my hand, then afterwards he grabbed my hand here (pointing toward the sacrum) and I managed, then, in my struggle, I was able to get to the edge of the bed.
Q. Did you strike him in the face, or scratch him?
A. I did not have the chance, because my hands were held.
A. Yes, he did hold my two hands, but not with his two hands. It was one hand (pointing, with her arm) at first he took her left arm and then took her right arm, and thrust it toward her shoulder and held it against her body. As he was very heavy (taking the interpreter's left hand) he held it at an angle, in about such a position (off the interpreter's breast); with one hand thus he would hold me, and the part of the body he would hold with his arm.
A. He had both hands most all the time, except for one moment he withdrew a hand, but I don't know whether it was for the purpose of lowering his pants or not, but that was the only time when both of his hands did not hold my two hands."

(R. 90):

"A. Almost on the edge of the bed. My legs were up, and then taking her two hands, and holding them over her thus, beyond the edge of the bed. Then, again (illustrating) placing her hands about six inches above her knees, from this part upwards, that part of the body upwards, and this part over the edge of the bed."

(R. 91):

"A. One of his legs budged my legs apart and got in the center."

(R. 71):

"A. I didn't say anything; I was so completely exhausted."

On (R. 45) respondent testified in effect that the bedclothing was almost clean, but that she was almost on the edge of the bed, but that Blanco's clothing was stained. And on page 91 that Blanco threw her nightgown up, and she could not tell whether there was any blood on the sheets as they were all bundled up, but that when she put her drawers on she stained them with blood.

R. v. William Crocker, 17 English Criminal Appeals, (1922) 46.

Lord Chief Justice Darling:

"The jury had the opportunity of seeing and hearing the witness, and there are persons—especially young persons, who somehow are able to convey the fact that the story they tell is true, and here, after the learned judge's warnings, the jury came to the conclusion that the girl's story was true and ought to be acted upon.

The Court considers that it would be a new departure if it allowed this appeal, as it cannot usurp the functions of the jury."

(Syllabus):

"On the trial of a sexual offense against a female her evidence need not necessarily in law be corroborated."

People v. Slaughter, 33 Cal. Appellate 365, 381.

"It is true that her testimony should be clear and convincing, but it is for the jury and the trial judge to determine whether it fulfills that requirement."

People v. Jones, 76 Cal. App. 144, 148.

"It is well settled that one may be convicted of rape upon the uncorroborated testimony of the prosecutrix, if the jury believes her story."

People v. Mazzurco, 49 Id. 275, 276;

Lindville v. Green, 125 Mo. App. 290;

People v. Valencia, 85 Cal. App. 306.

Where the case is tried before a judge, the rule is the same.

The City of New York, 54 Fed. 181.

"The demeanor of the witness is a material and important part of the evidence, which cannot be sent up with the record; and, because this is so, the rule prevails in appeals in admiralty that the opinion of the trial judge will not be disturbed upon questions of fact, depending upon the credibility of witnesses who were examined in his presence, unless there is a decided preponderance of evidence the other way."

But in this case respondent is overwhelmingly corroborated by the testimony of witness and the laws of nature.

VI.

THE LAW OF CRIMINAL AND CIVIL RAPE.

Counsel contends that because there was no outcry or complaint until the prosecutrix was compelled to tell someone by reason of her condition, that she is not entitled to recover, neither of those matters were ever inflicted as a penalty, and are always subject to explanation.

It is proper to say at this time that no two persons male or female will ever act alike in emergencies, and

no rule of conduct can ever be made that will fit all human natures, if there was any such hard and fast rules, it would be the duty of the law to establish training schools to educate women in what to do when criminally attacked so that they could all act alike, and in this case such a school would have been necessary on the "Ecuador."

Criminal rape is an act of sexual intercourse with a female not the wife of the perpetrator, where she resists, but her resistance is overcome by force or violence.

There is nothing anywhere in the definition of rape that requires her to make an outcry. In the case of robbery one person may call out and another may be too terrified to do so, as with all violence to the person, and as the Supreme Court of the State of California, properly said in

People v. Kuches, 120 Cal. 566, 569.

> "(*State v. Cone,* 8 Jones 18): One person would be paralyzed by fear and rendered voiceless and helpless by circumstances which would only inspire another with higher courage and greater strength of will to resist an assault."

The uniform rule at this time is that outcry or no outcry, the question is one for the jury or the trial court, and if either believe her, her uncorroborated evidence is sufficient to sustain a verdict of guilty in a criminal case.

Respondent cites the case of *Olsen v. State,* 11 Nebraska 276, and quotes:

> "Nature had given her hands and feet with which she could kick and strike, teeth to bite, and

a voice to cry out; all these should have been put in requisition in defense of her chastity."

That case was decided in 1881, in the subsequent civil rape case of *Kramer v. Weigand,* 91 Neb. 47, 51, decided in 1912. The same court draws a distinction between civil and criminal rape, and says:

> "When confronted under such circumstances by a sudden, unexpected assault and seized by a fear of being discovered, a virtuous woman, before making an outcry, might trust to her powers of resistance until it was too late, and even conceal the outrage in the hope of escaping exposure."

And also cites *People v. Dohring,* 59 N. Y. 374, where the court says:

> "Of course, the phrase, 'the utmost resistance,' is a relative one; and the resistance may be more violent and prolonged by one woman than another, or in one act of attending physical circumstances than another. In one case a woman may be surprised at the onset and her mouth stopped so that she cannot cry out, or her arms pinioned so that she cannot use them, or her body so pressed upon that she cannot struggle."

The uncontradicted evidence is that respondent's arms were held, her body pressed upon and she was continually being kissed, and that 20 men waiters were scrubbing the deck of the saloon immediately above her head, polishing brass and generally cleaning up the saloon and that there is always a lot of noise at that time in the morning, all those things must be t[illegible]ken into consideration, they operated on her mind, she says they did, and she was necessarily weak

from the lack of food and seasickness, in other words she was not a normal woman.

As to complaints, or present discovery, in the case of

Commonwealth v. Cleary, 172 Mass. 175, 176,

Judge, now Justice Holmes, wrote the following common sense view of that:

> "The rule that in trials for rape the government may or must prove that the woman concerned made complaint soon after the commission of the offense is a perverted survival of the ancient requirement that she should make hue and cry as a preliminary to bringing her appeal. * * * .
>
> If it means what it has been taken to mean, that the government can prove fresh complaint as part of its original case, it cannot be justified by the principles of evidence which now prevail. In general, you cannot corroborate the testimony of a witness by proof that he has said the same thing before when not under oath."

No woman wants to tell to the world that she is no longer a good girl, particularly strangers, and the law does not require that she shall tell strangers or anyone else. As to strangers, in the following case cited by petitioner:

People v. O'Sullivan, 104 N. Y. 481.

We find on pages 489-490:

> "But there may be circumstances which will excuse delay as when the prosecutrix * * * is among strangers."

Miss Vargas was among strangers, and she naturally thought (R. 81):

"A. I did not complain to any of them in the first place, because they did not speak Spanish, and, in the second place, because they might consider me a woman of bad repute or conduct."

(R. 72):

"I decided to suffer my disgrace alone, without telling anybody."

Those are the answers of a modest woman.

State v. Peters, 8 Jones N. Car. 19, 22.

"But it is nowhere held that this female instinct is so strong and unerring as to have been made the foundation of a rule of law, as distinguished from a rule in respect to evidence and the weight to which it is entitled, which is a matter for the jury."

Lindville v. Green, 125 Mo. App. 290:

"but we know of no case where the testimony of the prosecuting witness has been rejected solely on this ground, * * * it must be remembered that plaintiff had no mother nor any other woman sufficiently close in her confidence and friendship in whom to confide." (306.)

"Finding as we do, that her conduct was not necessarily inconsistent with the natural impulses of feminine modesty and virtue."

Kramer v. Weigand, 91 Neb. 50.

"In her testimony she explained that she did not think to make an outcry, and that she was ashamed to tell what had taken place."

Respondent is not the only woman that did not like to tell people of her trouble.

State v. Miller, 191 Mo. 612.

"They seem to indicate that an outcry is a necessary essential part of the proof of this of-

fense, whereas the failure of an outcry is simply a fact tending to discredit the good faith of the charge, a circumstance only of more or less weight, depending upon the surrounding circumstances. A failure to make it raises no presumption of law that the prosecutrix has sworn falsely; it is a circumstance to be weighed by the jury. (State v. Machis, 240 Mo. 650, i. e., 668, 662, and so also the delay in making the complaint."

People v. Horn, 25 Cal. App. 583.

"(Syllabus) In a prosecution for rape it was proper for the court to reject an instruction offered by the defendant, which, if given, would have impressed upon the jury the importance of the absence of proof that the prosecutrix made complaint of the assault immediately after it occurred, as such an instruction would tend to create the impression that a conviction of the crime of rape could not legally be justified where there was not proof of immediate discovery of some third party by the prosecutrix of the fact of the assault upon her person, *which is not required by the law.*"

(588):

"The fact that the prosecutrix in a case of rape might have made complaint of the assault to a third person immediately after it took place may be shown for the purpose of corroboration only."

People v. Martinez, 59 Cal. App. 121.

"As we have stated, the fact of defendant's guilt did not depend upon corroboration of her testimony, and fact that she a female under sixteen years of age, made no outcry but concealed from others the knowledge of the act was not material to the inquiry, provided, the jury upon sufficient evidence was satisfied that he was guilty of the act charged."

Garvik v. The Burlington Cedar Rapids Ry. etc., 131 Iowa, 415, 418.

"While the ordinary female who has been ravished will make the fact known to her family or friends at the very earliest possible moment, complaint is not always made and we have repeatedly held that conviction in criminal cases charging rape is proper though no complaint is made."

People v. Norrington, 55 Cal. App. 103, 108, 109.

"Though the absence of such outcries may have a tendency to refute the hypothesis of guilt, it is by no means conclusive. While, from the nature of the crime, it may be expected in such cases that the utmost reluctance would be manifested, and the utmost resistance made which the circumstances of the case will allow, still, to hold, as a matter of law, that such manifestations and resistance are essential to the existence of the crime, so that it could not be committed if they were wanting, would be going further than any well considered case in criminal law has hitherto gone. (State v. Pilegge, 61 Wash. 264.)"

Baccio v. The People, 41 N. Y. 265.

"that it is so natural as to be almost inevitable, that a female upon whom the crime has been committed will make immediate complaint thereof to her mother, or other confidential friend."

Miss Vargas had no mother, and no friend on board, and Blanco had told her that if she told anyone they would not pay any attention to her, she had a right to think on that that the whole crew were as bad as he was, as to the passengers, she testified (R. 81):

"* * * because they might consider me a woman of ill repute and bad conduct.

(R. 82):

A. I did not have any confidence in her, she was not any friend, other than an acquaintance, a mere acquaintance on board."

Counsel admit the Fillipino waiters were bad.

VII.

THE LAW OF CIVIL RAPE.

Jensen v. Lawrence, 94 Wash., supra;

6 *American Law Reports,* Annotated, 1011 (syllabus).

"Where an assault is accomplished by lascivious conduct by her assailant, and he improperly handles the wronged female, or indulges in undue or indecent familiarity with her person, it constitutes at least an indecent assault, and if the intention is to secure carnal knowledge of the female, it will constitute assault with intent to commit rape, and where actually accomplished by ravishment, it will constitute rape, *providing the woman does not consent to the acts complained of.*"

"This doctrine finds support in the following cases which involve an assault with one of the characters complained of."

The footnote contains a list of authorities from a great many states of the Union.

Totten v. Totten, 172 Mich. 565, 575:

"The court in its charge clearly and correctly defined assault and battery and rape, then stated that in this civil case: 'The mere fact that she did not resist to the utmost would not excuse the

defendant from his unlawful acts, *if you find he had intercourse with her against her consent.*"

The charge was held correct; authorities cited.

In the case of

People v. Bonzani, 24 Cal. App. 549,

the court says on page 558, when discussing the crime of criminal rape:

> "Men often become demons on such occasions or while attempting an outrage by force upon the opposite sex."

Of course, any one is entitled to damages for any kind of an assault the aggravated character thereof simply increasing the amount of the recovery.

33 *Cyc.* 1521:

> "But conduct of plaintiff short of consent is no justification, and if force was used to overcome the resistance of plaintiff and she finally consented to intercourse, although not in consequence of the violence, defendant is still liable in damages for the assault."

Palmer v. Baum, 123 Ill. App. 584.

In that case the parties had been drinking together, and the court stated the law to be as follows, on page 587:

> "The penetration of the person of the woman without her consent, although no considerable force is shown to have been exercised, it amounted in law to an assault; such an assault being clearly unlawful, force may be implied. The mere fact that the woman may have permitted appellant to, and did herself, indulge in such lascivious conduct is to almost amount to an invitation to him to do as he did, did not in law authorize or license him to penetrate her person without her knowledge or consent."

Civil rape is necessarily an aggravated assault and battery, and the courts uniformly hold that lack of consent to penetration is all that is necessary to sustain a conviction.

VIII.

PETITIONER'S AUTHORITIES.

They are from nine states in the Union, all of considerable age, and the court rendering the decisions has either modified the language or said something else in about all of them.

In this case there is no conflict of evidence now, and respondent is overwhelmingly corroborated. There are some special facts in each case cited by petitioner, as follows:

People v. Benson, 6 Cal. 221, 223.

The Supreme Court of California distinguishes that case in *People v. Moore,* 155 Cal. 237, saying, referring to *People v. Benson,* on page 240:

> "In several subsequent cases the language of that part of the opinion in the Benson case in which the weakness and inconsistency of the evidence is commented upon has been adopted as a ground of decision. But they were cases in which the prosecuting witness was uncorroborated as to the assault, and where circumstances inconsistent with her testimony were clearly proved. * * *"

People v. Benson is also commented upon by the District Court of Appeal in

People v. Norrington, 55 Cal. App. 103, 109, where the court says that it and other cases were re-

viewed by the Supreme Court in *People v. Moore,* and

> "They have no application where, as here, all the outward facts are clearly established."

The conviction was sustained in *People v. Dohring,* 59 N. Y. S. 374, and we have already quoted from that decision.

We have also heretofore quoted from

People v. O'Sullivan, 104 N. Y. 481.

In that case the prosecutrix claimed she had been assaulted by a Catholic priest, in whose house she was housekeeper, she remained in the house, went to confessional, and made no complaint for eleven months.

In *Lind v. Closs,* 88 Cal. 6, the resistance, if any, was equivocal, and the defendant admitted a great deal of what the prosecutrix testified to, claiming consent; she, however, told so many conflicting and improbable stories that the verdict was set aside.

See

Kramer v. Weigand, supra.

In *Oleson v. State,* 11 Neb. 276, the case was reversed for errors in admission of testimony; whatever else appears was therefore dictum.

Connors v. State, 47 Wis. 523, was reversed for errors in instructions, and there was strong evidence in favor of defendant.

Whittaker v. State, 50 Wis. 518, was reversed for improper instructions.

One of those cases was decided in 1880, and one prior thereto. In the subsequent case of

McLain v. State, 159 Wis. 204,

decided in 1914, which is also a later case than *Brown v. State,* 125 Wis., largely relied upon in petitioner's brief, the same court says:

> "It must be remembered that the term 'utmost resistance' is a relative rather than a positive term. What would be 'utmost resistance' on the part of a weak, nervous person with a temperamental and easily frightened disposition, might be the veriest sham on the part of a robust person in good health whose nerves and courage are normal."

Counsel for petitioner seems to misunderstand.

State v. Cowing, 99 Minn. 123 (Syllabus):

> "In a prosecution for rape, resistance of the female is of necessity an issue only as it is invoked in the proof of her want of consent, which is always required. To show unwillingness her resistance must be proportionate to the occasion under the circumstances and at the time of the act complained of; in many cases there must be resistance to her utmost, or at least to the extent of her ability. In peculiar cases a less degree may be sufficient. In exceptional cases, rape may be made out without any proof of resistance."

Same court, *Wiltska v. Moudray,* 83 Minn. 73, 81:

> "The defendants further request, after pointing out in a proper manner the evidentiary force of silence by plaintiff, and her failure to denounce the perpetrator of the assault afterwards, destroys the value of such suggestions by the qualifying phrase that such failure to make an outcry, or to denounce her assailant, creates a presumption against her. The instruction in that regard went too far."

In *State v. Barnes,* 140 Minn. 519, the court held that the whole question was one for the trial court or jury.

Champagne v. Hamey, 189 Mo. 709, presents a singular state of facts. Hamey was convicted of rape, in a criminal case, the Appellate Court sustained the conviction, but reversed a judgment for damages presumably upon the same evidence. But in that case the families lived within 90 feet of one another, and the girl made no complaint of force for about a year and until after a child was born.

State v. Kinney, 44 Conn. 153.

Is contrary to all the decisions, as it holds that the details of an extrajudicial statement can be given in evidence.

The case was decided in 1876, and the court says (p. 156):

> "We are aware that the decision in this case goes farther than the courts have gone in England and in most of the states in this country."

In 1908 the same court says in *State v. Sebastian,* 81 Conn. 1, 6:

> "* * * and proof has been admitted of complaints made many months after the time when, as the complainant declared, the rape took place."

On the quotation from Blackstone, he, Blackstone (Cooley's Blackstone, 1374), takes up the original rule established many years before. Parliament fixed forty days as the time in which a complaint could be made, then abolished it and fixed no time at all, as the writer adds "for the reason that time does not run against the king." At that time England probably had about two or three million people, was largely rural, everyone knew everyone else in the vicinity, and the previous reputation of a girl was well known, so that that

alone was at hand to know whether the complaint was well founded or not, a complainant was not among strangers, not in a new environment, and the conditions were entirely different to that of a young person going on board of a modern steamship.

Blackstone divides women up into two classes, writing of those of good and those of bad fame, and what appears on page 43 of petitioner's brief relates to women of bad fame, and even then he writes that it is but a question of credibility, as follows:

> "These and the like circumstances carry a strong *but not conclusive presumption* that her testimony is false or feigned."

That language shows that the credibility of the prosecutrix is a question for the trial tribunal.

In *Mills v. United States,* this court refused to pass upon the facts, except comment on the improbability of the story of the complaining witness. The court cites Sec. 1122 of *Bishop on Criminal Law.* In the last, 9th ed., published in 1923, we find the following in that section, speaking of the authorities:

> "The stronger ones just quoted might not be very objectionable in a barbarous age, but in our age, to compel a frail woman, or girl of fourteen, to abandon her reason, and measure all her strength with a robust man, knowing that the effect will be to make her present deplorable condition the more wretched, yet, not to preserve her virtue, on pain of being otherwise deemed a prostitute instead of the victim of an outrage, is asking too much of virtue and giving too much to vice. *The text of the law,* we have seen, and, it is believed, the better judicial doctrine requires only that the case shall be one in which the woman did not consent. Her resistance, however, must not be a mere pretense, but in good faith."

IX.

THE COURT ERRED IN NOT AWARDING A LARGER SUM AS DAMAGES.

The award was $10,000.00. That amount put out at bank interest would produce but $425.00 per annum. Miss Vargas has to pay her lawyer, so she will not net that amount. It is costing her $25.00 per month for the care of her child brought into the world against her will, and $6.00 for milk, a total of $31.00 per month, or $372.00 per year, without clothes or other necessaries.

In the case of

Campbell v. Pullman Palace Car Co., 42 Fed. 484,

heretofore cited herein, the court charged the jury, on the question of damages, that she was entitled to recover for detriment to her health and strength by the wrong done her, including pain and suffering, mental and physical. An award of $11,000.00 was made and the case was afterwards affirmed by this court. In that case the facts showed no sexual intercourse, no force, and money was worth much more than it is now.

McGhee v. McCarley, 103 Fed. 55.

In the following case money was of much greater purchasing power at that time and the jury gave an award of $25,000.00, and the facts in that case were not nearly as bad as they are in this.

Marshall v. Taylor, 98 Cal. 55.

The Supreme Court says on that subject on pages 62, 63:

> "We are not prepared to say that the damages are excessive. Courts are not disposed to make smooth the ways of the seducer. At common law in these cases, verdicts of juries were seldom held to be excessive, and this, too, where the parent recovered damages upon the fiction of loss of service. With much greater reason should we not disturb the amount of a verdict where the party directly injured is the party plaintiff. Through the seducer's arts a young girl has been outlawed from society; she has been cast upon the world, robbed of her innocence; and injury has been done which nothing can repair; a loss has been suffered which nothing can alleviate."

In that case a child was born, but the evidence was sharply conflicting.

Corporations are liable in exemplary damages in cases like this, and exemplary damages are the rule in such cases.

See 33 *Cyc.* 1521.

The ability of defendant to pay is shown by the fact that it is capitalized for $1,500,000.00.

We do not think appellant is entitled to any sympathy in this case. Its Port Steward was present at the hearing before Commissioner Krull, and it was there determined that Miss Vargas was entitled to redress. The whole actions of appellant since have been a ratification of what he did, but the young lady, who was entitled to safe carriage, as her relatives paid for it, has never received the coldest consideration from appellant.

Respectable women travel on the ocean. The following shows that appellant does not seem to think that is of much consequence (R. 126), which is a part

of the conversation between Mr. Schenick, appellant's Port Steward, Amaral, and Mr. and Miss Vargas:

> "He said, addressing Joe, 'You know that you can't work for this company unless you take good care of this girl and the child that is coming that is yours.'"

Blanco was still kept in appellant's employ.

We respectfully submit, that respondent's case is overwhelmingly established, that the claims about outcries and complaints are but matters that no longer are considered of any importance, except when the testimony of the prosecutrix stands alone, and is weak, and then only for corroboration, and that the corroboration of respondent in this case is so overwhelming that they are unimportant.

The defense in the case seems to be as follows:

1. That if the crime of rape is committed and the woman attacked makes no outcry or subsequent complaint the crime of rape is not committed even though she is overwhelmingly corroborated.

2. That Commissioner Krull did not think the crime was rape. What difference does that make? Two courts charged with passing all of the facts have held that it was, and the testimony before him shows he made a mistake.

3. The innuendo that Miss Vargas unlocked the door of her stateroom to allow Blanco to enter. The uncontradicted proof herein is that they never talked together.

4. That Miss Villavicencio had been assigned to stateroom 31 while the vessel was in La Libertad.

The testimony shows that she was not assigned until the evening after the attack. But if she had been assigned, this attack could have been made while she was absent from the room.

As to the ring, Miss Vargas left money with the purser, and had it returned before she left the vessel. If she had wished safekeeping for the ring she would have given that to the purser also, and if she had given it to Blanco she would have got it back again when she left the vessel, as she did her money, and not made another trip down there with her brother and sister-in-law to get it.

We respectfully submit that her case shows an atrocious assault, is overwhelmingly established and that she is entitled to larger damages.

Dated, San Francisco,
April 7, 1930.

Respectfully submitted,
H. W. HUTTON,
Attorney for Respondent.